

**Final Statement of Reasons for the
Adoption of California Code of Regulations,
Title 18, Sections 2000, *Retailer Reimbursement Retention*, and
2001, *Additional Allowed Retailer Reimbursement Retention***

I. Update of the Information in the Initial Statement of Reasons

A. Relevant Background Information Provided in the Initial Statement of Reasons

The initial statement of reasons for the proposed adoption of California Code of Regulations, title 18, sections (Regulations) 2000, *Retailer Reimbursement Retention*, and 2001, *Additional Allowed Retailer Reimbursement Retention*, provides as follows:

Current Law

Public Resources Code section 4629.5

Public Resources Code (PRC) section 4629.5, as enacted by Assembly Bill No. (AB) 1492 (Stats. 2012, ch. 289), imposes, on and after January 1, 2013, a one-percent assessment on purchasers of lumber products and engineered wood products (Lumber Products Assessment) to be collected by retailers at the time of sale. As enacted by AB 1492, PRC section 4629.5, subdivision (a)(3) authorizes the State Board of Equalization (Board) to adopt regulations to determine the amount retailers may retain from the assessments they collect as reimbursement for certain compliance costs. Specifically, PRC section 4629.5, subdivision (a)(3), in relevant part, provides:

The retailer shall collect the assessment from the person [i.e., purchaser] at the time of sale, and may retain an amount equal to the amount of reimbursement, as determined by the State Board of Equalization pursuant to regulations, for any costs associated with the collection of the assessment, to be taken on the first return or next consecutive returns until the entire reimbursement amount is retained.

Notably, PRC section 4629.5 and the legislative analyses of AB 1492 do not expressly indicate how the Board is to determine the amount of reimbursement that retailers may retain. However, the statute does appear to provide that retailers may only retain the Board-prescribed amount of reimbursement one time, on the retailers' first returns or next consecutive returns filed immediately after the retailers are required to begin collecting the Lumber Products Assessment on January 1, 2013. And, the statute does not authorize retailers to retain additional amounts thereafter.

As to legislative history, both the relevant Senate and Assembly floor analyses refer to retailers being reimbursed for “costs to set up collection systems.” (See p. 2 of the September 1, 2012, Assembly Floor Analysis of AB 1492 and p. 2 of the August 29, 2012, Senate Floor Analysis of AB 1492.) Thus, both the plain language of PRC section 4629.5, subdivision (a)(3) and the available information regarding legislative intent support an interpretation that subdivision (a)(3) provides for affected retailers to retain a one-time amount, as specifically determined by the Board, for reimbursement of costs to set up collection systems prior to the commencement of their collection duties on January 1, 2013. Neither the plain language of PRC section 4629.5, subdivision (a)(3) nor the available legislative history persuasively support an interpretation that would allow for the retention of amounts in excess of the Board-specified reimbursement amount to compensate retailers for ongoing collection costs.

Emergency Regulation 2000

In addition, PRC section 4629.5, subdivision (a)(3), as added by AB 1492, authorizes the Board to “adopt emergency regulations,” pursuant to Government Code section 11346.1, to prescribe the amount retailers may retain from the Lumber Products Assessments they collect, and provides that the adoption of any such regulations “shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health, and safety, and general welfare.” Therefore, on October 23, 2012, the Board voted to:

- Added new chapter 4.1 to division 2 of title 18 of the California Code of Regulations so that any regulations the Board is required to adopt to implement, interpret, and make specific the Lumber Products Assessment imposed by PRC section 4629.5 can be codified in the new chapter; and
- Adopt California Code of Regulations, title 18, section (Regulation) 2000, *Retailer Reimbursement Retention*, which is codified in new chapter 4.1, as an emergency regulation, in order to determine the “amount of reimbursement” a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3), before retailers started collecting the new assessment on January 1, 2013.

Emergency Regulation 2000 provides that retailers as of January 1, 2013, may retain collected assessment amounts of up to \$250 per location as reimbursement for one-time, startup costs associated with the collection of the assessment (i.e., the costs to set up collection systems). Specifically, Regulation 2000 provides:

Public Resources Code section 4629.5, as added by Statutes 2012, chapter 289, requires the Board of Equalization to adopt a regulation to determine the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by Public Resources Code section 4629.5.

A retailer required to collect the Lumber Products Assessment may retain no more than \$250 per location as reimbursement for startup costs associated with the collection of the assessment. Such reimbursement is to be taken on the retailer's first return on which the Lumber Products Assessment is reported or, if the amount of the collected assessment is less than the allowed reimbursement, on the retailer's next consecutive returns until the allowed reimbursement amount is retained.

"Location" means and is limited to a business location registered under the retailer's seller's permit as of January 1, 2013, where sales of products subject to the assessment are made.

The \$250 retention amount in emergency Regulation 2000 is based on the Board's understanding of the amount of retailer reimbursement discussed when AB 1492 was drafted. Staff also estimated the \$250 retention amount in emergency Regulation 2000 using U.S. Census Bureau data and a 2006 PricewaterhouseCoopers report on gross retail sales tax compliance costs for programming and servicing cash registers for sales tax rate and bases changes (PricewaterhouseCoopers report). And, emergency Regulation 2000 recognizes that an affected retailer's start-up costs will be affected by the number of retail locations the retailer must get ready to collect the new assessment on January 1, 2013.

An emergency regulation adopted pursuant to Government Code section 11346.1 is effective for a 180-day period. The Office of Administrative Law (OAL) may approve two readoptions of the same emergency regulation, under specified circumstances, each for an effective period of 90 days. However, an emergency regulation will automatically be repealed and deleted from the California Code of Regulations, unless the regulation is readopted through the regular rulemaking process before the emergency regulation ceases to be effective. (Gov. Code, § 11346.1, subs. (e), (g), and (h).)

Emergency Regulation 2000 became effective on January 1, 2013. The Board subsequently readopted emergency Regulation 2000 in accordance with Government Code section 11346.1, subdivision (h). OAL approved the readoption on June 25, 2013, and indicated that readopted emergency Regulation 2000 will not expire until September 24, 2013. Therefore, OAL still has discretion to approve one more readoption of emergency Regulation 2000 before that time, which may extend the effective period of the regulation by an additional 90 days.

Specific Purpose of, Problem Intended to be Addressed by, Necessity for, and Anticipated Benefits from the Proposed Regulations

Business Taxes Committee Process

The California Forestry Association supported the initial adoption of emergency Regulation 2000 and the \$250 reimbursement amount established by the regulation. However, the Board did not immediately propose to adopt emergency Regulation 2000 through the regular rulemaking process because other interested parties, including the California Retailers' Association and the West Coast Lumber & Building Material Association (West Cost), argued that affected retailers should receive more reimbursement, including reimbursement on an ongoing basis. Therefore, on October 23, 2012, the Board also unanimously voted to begin a Business Taxes Committee (BTC) process to meet with interested parties and discuss the adoption of a regulation, through the regular rulemaking process, to permanently specify the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by PRC section 4629.5 beginning January 1, 2013. However, Board staff was not able to reach a consensus with all of the interested parties regarding the substantive provisions of the permanent regulation during the BTC process. Therefore, Board staff summarized the BTC process and the remaining areas of disagreement in Formal Issue Paper 13-005, and distributed it to the interested parties and Board Members on May 31, 2013.

Start-up Costs and Ongoing Costs

Formal Issue Paper 13-005 explains that some interested parties read PRC section 4629.5, subdivision (a)(3), as providing for reimbursement of "any costs" associated with the collection of the Lumber Products Assessment, including ongoing costs. However, as previously discussed, Board staff believes that PRC section 4629.5, subdivision (a)(3) authorizes the Board to determine and prescribe a specific one-time amount of reimbursement for start-up costs to implement the Lumber Products Assessment on January 1, 2013, that may be retained by all affected retailers, regardless of their actual costs; and staff does not believe that the statute allows retailers to retain a percentage of the assessments they collect or retain unique amounts of reimbursement for their actual start-up or ongoing costs. This is primarily because:

- PRC section 4629.5 expressly provides that retailers may only retain "an amount" determined by the Board and does not authorize retailers to calculate and retain other amounts;
- PRC section 4629.5 requires a retailer to retain the Board prescribed amount of reimbursement from the assessments reported on its "first return or next consecutive returns until the entire reimbursement amount is retained"; and
- PRC section 4629.5 does not expressly provide for the ongoing retention of a percentage of collected assessments, as do the California Tire Fee Law and Covered Electronic Waste Recycling Fee Law, which both expressly authorize retail sellers to retain 1.5 percent (PRC § 42885) and 3

percent (PRC § 42464), respectively, of the fees they collect as ongoing reimbursement of collection costs.

The formal issue paper also explains that staff's understanding of PRC section 4629.5, subdivision (a)(3), is consistent with the Senate and Assembly floor analyses of AB 1492, which refer to retailers being reimbursed for "...costs to set up collection systems," not ongoing costs of collection. The formal issue paper further explains that the interested parties that supported AB 1492, including the California Forestry Association, California Native Plant Society, Forests Forever, Pacific Forest Trust, Sierra Club, and the Center for Biological Diversity, have confirmed that staff's understanding of PRC section 4629.5, subdivision (a)(3) is consistent with the intent of AB 1492. In addition, the formal issue paper indicates that California Assemblymembers Bob Blumenfield, Wesley Chesbro, Richard Gordon, Richard Bloom, and Roger Dickinson have recommended to the Board that reimbursement be limited to startup costs.

Amount of Reimbursement for Start-up Costs

In addition, Formal Issue Paper 13-005 explains that Board staff and some interested parties continue to disagree about the "amount" that affected retailers should be permitted to retain as reimbursement for start-up costs. These interested parties believe that the reimbursement amount in emergency Regulation 2000 is too low and that the amount should be increased to compensate most retailers for their actual start-up costs. For example, the formal issue paper explains that Caseywood estimated that it cost \$7,000 to implement computer system, internal process, and accounting changes necessary to comply with the new law. Other retailers advised staff that their current accounting systems could not be updated to calculate the new assessment, and that they were forced to update both software and hardware, at an estimated cost of \$45,000, in order to implement the assessment. Also, West Coast surveyed its members and informed staff that the members' average cost to implement the assessment was \$5,480 per location.

The formal issue paper explains that, to get a better idea of retailers' average costs to update their software for the Lumber Products Assessment, staff contacted three software companies that provide software packages for the retail lumber industry. One company indicated that it included the update to collect the assessment in its annual software update and did not charge an additional amount to its existing customers, and the other software providers advised staff that for current customers they generally charged \$250 per location to update their software to collect the assessment. The latter providers also explained that they priced their updates to match the amount provided in the Board's emergency regulation as a courtesy to existing customers and as a selling point to attract new customers. The software providers also explained that their charges (if any) did not include the hours spent reviewing inventory and coding SKU's (stock keeping units) for products subject to the assessment. These tasks were typically

completed by a retailer's employees with the expense incurred directly by the retailer. Further, staff learned that retailers who use custom or proprietary accounting software were not able to take advantage of pricing discounts from package software providers and generally paid hourly rates for software technicians to update their systems. Furthermore, staff found that one company estimated that for a new retail account, they would charge about \$30,000 plus a monthly fee to set up a whole new accounting system that performed various functions, including collecting the Lumber Products Assessment.

The formal issue paper also explains that, to get a better idea of retailers' average costs to update their software for the assessment, staff continued to review the available cost data, including the PricewaterhouseCoopers Report, referred to above, and found another reasonable alternative method that could be used to estimate affected retailers' average start-up costs. First, staff found that "the purpose of AB 1492 was, among other things, to ensure continued sustainable funding for California's forest program to protect the state's forest resources and to replace the current piecemeal funding structure with a single funding source" and that the amount of allowed retention directly affects the revenue the fund receives. Second, in Board staff's September 11, 2012, Legislative Enrolled Bill Analysis of AB 1492, staff estimated that the new one-percent Lumber Products Assessment would generate annual revenue of \$35 million from approximately \$3.5 billion of sales subject to the assessment. Third, during the BTC process, staff estimated, using U.S. Census Bureau data, that there were close to 10,000 retail locations that were required to begin collecting the new assessment on January 1, 2013, and that each location would collect an annual average of \$3,500 in assessments on average annual sales of \$350,000 subject to the assessment.

Fourth, during the BTC process, staff also analyzed the PricewaterhouseCoopers Report in more detail, and found that the \$250 amount in emergency Regulation 2000 accounted for costs to program and service cash registers (and other point-of-sale systems), but did not account for the following seven other categories of compliance costs, included in the study: (1) training personnel; (2) documenting exempt sales; (3) customer service relating to assessment issues other than documenting exempt sales; (4) assessment-related software acquisition and license fees; (5) return preparation, making remittances, refund and credit claims, and research relating to the assessment; (6) dealing with audits and appeals; and (7) other costs (such as costs related to data storage, registration, etc.). Further, staff found that the PricewaterhouseCoopers Report shows an average gross compliance cost of 0.21 percent of taxable sales for the Building and Garden Supplies industry. Furthermore, staff recognized that the percentage was derived from looking at some costs that were not properly classified as start-up costs, such as costs to deal with audits and appeals, but that the percentage also failed to account for some costs that were properly classified as start-up costs, such as costs to identify and code products subject to the assessment. Therefore, staff concluded that it would be reasonable to use the percentage to calculate start-up costs.

As a result, in the formal issue paper, staff calculated that the average amount of start-up costs to implement the Lumber Products Assessment on January 1, 2013, was approximately \$735 per retail location by multiplying the average amount of annual sales subject to the assessment that staff estimated would be made by each retail location (\$350,000) by 0.21 percent. Staff also proposed that affected retailers be permitted to retain an additional \$485 (\$735 - \$250) from the assessments they collect, for start-up costs, beginning January 1, 2014.

Alternative Recommendations

Based upon the above discussion, Formal Issue Paper 13-005 contained the following three recommendations:

1. Staff's recommendation that the Board propose to adopt emergency Regulation 2000, through the regular rulemaking process, without making any changes, and that the Board also propose to adopt new Regulation 2001, *Additional Allowed Retailer Reimbursement Retention*, through the regular rulemaking process, to provide that "[b]eginning January 1, 2014, a retailer required to collect the Lumber Products Assessment may retain \$485 per location, in addition to the \$250 allowed by Regulation 2000, as [additional] reimbursement for startup costs associated with the collection of the assessment";
2. An alternative recommendation that the Board only propose to adopt emergency Regulation 2000, through the regular rulemaking process, without making any changes, which is supported by the California Forestry Association, California Native Plant Society, Forests Forever, Pacific Forest Trust, Sierra Club, and the Center for Biological Diversity, and was recommended by California Assemblymembers Bob Blumenfield, Wesley Chesbro, Richard Gordon, Richard Bloom, and Roger Dickinson; and
3. Another alternative recommendation that the Board adopt a regulation, through the regular rulemaking process, that permits retailers to initially retain \$5,500 per retail lumber location and annually retain an additional \$1,500 per location on an ongoing basis, based upon a recommendation from West Coast.

BTC Meeting

The Board considered Formal Issue Paper 13-005 during its BTC meeting on June 11, 2013. The Board agreed that the purpose of AB 1492 was to ensure continued sustainable funding for California's forest program to protect the state's forest resources and that it was reasonable to consider how the amount of reimbursement established by the Board affects the revenue available for such purpose. The Board agreed with staff that PRC section 4629.5, subdivision (a)(3) authorizes the Board to determine and prescribe a specific one-time amount of reimbursement for start-up costs to implement the Lumber Products Assessment on January 1, 2013, that may be retained by all affected retailers, regardless of

their actual costs. The Board also tentatively agreed with staff's revised calculation of the average amount of start-up costs to implement the Lumber Products Assessment on January 1, 2013, of approximately \$735 per retail location. Therefore, the Board voted to propose to adopt emergency Regulation 2000, through the regular rulemaking process, without making any changes, and also to propose to adopt new Regulation 2001, through the regular rulemaking process, to provide an additional \$485 per location, in addition to the \$250 allowed by Regulation 2000, as reimbursement for startup costs associated with the collection of the Lumber Products Assessment.

However, staff's revised calculation of the average start-up costs per retail location relied upon:

- Staff's estimate that the new one-percent Lumber Products Assessment would generate annual revenue of \$35 million from approximately \$3.5 billion of sales;
- Staff's estimate that there were close to 10,000 retail locations that were required to begin collecting the new assessment on January 1, 2013;
- The conclusion, drawn from those estimates, that each retail location would make average annual sales of \$350,000, subject to the assessment; and
- Staff opinion that it was reasonable to use the average gross compliance cost of 0.21 percent of taxable sales for the Building and Garden Supplies industry from the PricewaterhouseCoopers Report to estimate the average start-up costs for the Lumber Products Assessment.

As a result, additional information may change staff's estimates, conclusions, and opinions, help staff identify other, more reliable methods to calculate the average start-up costs per retail location, or both. Therefore, at the conclusion of the BTC meeting, the Board also directed staff to continue to monitor the implementation of the Lumber Products Assessment and review the returns filed for the first and second quarters of 2013 to try to obtain additional information to help verify the number of retail locations that were required to begin collecting the new assessment on January 1, 2013, and the amount of revenue they are actually collecting. And, the Board indicated that, depending upon the additional information obtained, including information regarding the effectiveness of AB 1492 as a source of funding, and staff's recommendation at the public hearing, the Board may decide to adopt proposed Regulation 2000 without making any changes and not adopt proposed Regulation 2001, the Board may decide to adopt both proposed regulations without making any changes, or the Board may decide to adopt both regulations and change the total amount of reimbursement provided to affected retailers.

B. Second Readoption of Emergency Regulation 2000

On August 13, 2013, the Board readopted Regulation 2000 for the second time, as an emergency regulation pursuant to Government Code section 11346.1, subdivision (h), without making any changes to the regulation's text. OAL approved the second readoption of emergency Regulation 2000 on September 23, 2013. OAL also indicated that readopted emergency Regulation 2000 will expire on December 24, 2013, unless the Board adopts Regulation 2000 through the regular rulemaking process and delivers the completed rulemaking file for the adoption of Regulation 2000 to OAL by December 23, 2013.

C. Written Public Comments

The Board received six written comments regarding the proposed adoption of Regulations 2000 and 2001 through the regular rulemaking process. The Board received a September 10, 2013, letter from Ken Dunham, Executive Director of West Coast. In the letter, Mr. Dunham reiterated West Coast's prior comments from the interested parties process that the average cost to implement the Lumber Products Assessment imposed by PRC section 4629.5 was approximately \$5,500 per retail location and that the Board should adopt a regulation that provides \$5,500 of reimbursement per retail location.

In the September 10, 2013, letter, Mr. Durham also indicated that West Coast believes that its estimate of its members' average cost to implement the Lumber Products Assessment (referred to in the initial statement of reasons) is more accurate than Board staff's estimate of the retailers' costs. This is because staff's estimate is based upon the PricewaterhouseCoopers Report on gross retail sales tax compliance costs for programming and servicing cash registers for sales tax rate and bases changes, referred to in the initial statement of reasons, and West Coast believes that it is more complicated and expensive to update complex computer systems to implement the Lumber Products Assessment than update cash registers for sales tax changes. Mr. Durham indicated that West Coast does not agree that the \$250 reimbursement amount prescribed by proposed Regulation 2000 is necessarily consistent with the express language of PRC section 4629.5, subdivision (a)(3) or the Legislature's intent in enacting that subdivision. Mr. Durham indicated that West Coast does not agree with Board staff's estimate of the number of retail locations that were required to begin collecting the Lumber Products Assessment on January 1, 2013, and that West Coast's has estimated that there may only be as many as 3,000 locations. Mr. Dunham also indicated that, based upon revenue from the first two quarters of 2013, West Coast estimates that the Lumber Products Assessment will produce approximately \$30.5 million of revenue in 2013. Therefore, West Coast believes that there should be a significant amount of revenue available to reimburse retailers after the 2013 Lumber Products Assessments are used to provide the funding needed for California's forest program to protect the state's forest resources and the Board's administration of the Lumber Products Assessment, which West Coast estimates to be in the \$20 million range and about \$3 million, respectively.

The Board received an undated letter from David Templeton, CFO of Central Valley Builders Supply (Central Valley). In the letter, Mr. Templeton indicated that Central Valley thinks the \$5,500 of reimbursement per retail location requested by West Coast is reasonable because \$5,500 reflects the actual cost of managing the Lumber Products Assessment. Mr. Templeton also indicated that Central Valley thinks Board staff's estimate of retailers' costs based upon the

PricewaterhouseCoopers Report does not take into account all of the retailers' costs to collect the Lumber Products Assessment.

The Board received a September 4, 2013, letter from Michael Tuchman, President of Roadside Lumber and Hardware, Inc. (Roadside). In the letter, Mr. Tuchman indicated that Roadside thinks Board staff's estimate of retailers' costs based upon the PricewaterhouseCoopers Report does not take into account all of the retailers' costs to collect the Lumber Products Assessment. Mr. Tuchman also stated that Roadside supports West Coast's request for \$5,500 of reimbursement per retail location.

The Board received a September 6, 2013, email from Matt Peterson, Vice President of Mead Clark Lumber Company, Inc. (Mead Clark). In the letter, Mr. Peterson indicated that Mead Clark thinks Board staff's estimate of retailers' costs based upon the PricewaterhouseCoopers Report does not take into account all of the retailers' costs to collect the Lumber Products Assessment. Mr. Peterson stated that Mead Clark incurred close to \$5,500 in costs to implement the Lumber Products Assessment. Mr. Peterson also urged the Board to consider providing the \$5,500 of reimbursement per retail location requested by West Coast, plus some continuing reimbursement for future compliance costs.

The Board received a September 9, 2013, letter from Will Higman, COO of Reliable Wholesale Lumber, Inc. (Reliable). In the letter, Mr. Higman indicated that Reliable thinks Board staff's estimate of retailers' costs based upon the PricewaterhouseCoopers Report does not take into account all of the retailers' costs to collect the Lumber Products Assessment. Mr. Higman said that Reliable has incurred "\$45,000 in IT costs" related to the Lumber Products Assessment. Mr. Higman expressed his understanding that the law provides for full reimbursement of lumber retailers for their costs associated with setting up collection systems. Mr. Higman also urged the Board to provide \$5,500 of reimbursement per retail location for costs to implement the Lumber Products Assessment, plus ongoing annual reimbursement of up to \$1,500 per retail location.

The Board also received a September 10, 2013, letter from David Thom, owner of Bruce Bauer Lumber and Supply (Bruce Bauer). In the letter, Mr. Thom indicated that it was expensive for Bruce Bauer to implement the Lumber Products Assessment and he also urged the Board to consider providing the \$5,500 of reimbursement per retail location requested by West Coast.

D. September 10, 2013, Public Hearing

The Board conducted a public hearing regarding the adoption of proposed Regulations 2000 and 2001 on September 10, 2013. Mr. Dunham appeared at the public hearing on behalf of West Coast and he reiterated the comments from his letter that:

- The average cost to implement the Lumber Products Assessment imposed by PRC section 4629.5 was approximately \$5,500 per location and that the Board should adopt a regulation that provides \$5,500 of reimbursement per retail location;
- West Coast believes that its estimate of its members' average cost to implement the Lumber Products Assessment is more accurate than Board staff's estimate of retailers'

costs based upon the PricewaterhouseCoopers Report, referred to in the initial statement of reasons;

- West Coast does not agree that the \$250 reimbursement amount prescribed by proposed Regulation 2000 is necessarily consistent with the express language of PRC section 4629.5, subdivision (a)(3) or the Legislature's intent in enacting that subdivision; and
- West Coast's has estimated that there may be about 3,000 business locations, plus or minus, that were required to collect the Lumber Products Assessment.

Mr. Dunham also explained that West Coast believes that the Lumber Products Assessment will likely generate more than \$30.5 million of revenue in 2013 and should provide a significant amount of money to reimburse retailers. And, he suggested that the \$5,500 of reimbursement requested by West Coast could be spread out over more time.

Jeff Pardini, CEO of Hills Flat Lumber Company (Hills Flat), appeared at the public hearing. Mr. Pardini described the work that Hills Flat had to do to implement the Lumber Products Assessment and explained how Hills Flat had to do more work to implement the assessment than Hills Flat would normally have to do to implement a change in the sales and use tax rate. Mr. Pardini also said that he estimated that it cost Hills Flat \$9,600 per location to implement the Lumber Products Assessment, but that the average cost in the industry is \$5,500 per location and Hills Flat is willing to acquiesce to \$5,500 of reimbursement.

Augie Venezia, President of Fairfax Lumber and Hardware (Fairfax), also appeared at the public hearing. Mr. Venezia stated that Fairfax's experience implementing the Lumber Products Assessment mirrors the experiences of the other lumber products retailers that submitted the written comments discussed above. Mr. Venezia also asked the Board to use the correct data, and to implement the reimbursement fairly and as provided by law.

During the public hearing, Board staff said that staff has continued to monitor the implementation of the Lumber Products Assessment, in accordance with the Board's direction from the June 11, 2013, BTC meeting, which was referred to in the initial statement of reasons. Board staff explained that staff has reviewed the returns filed for the first and second quarters of 2013 to try to obtain additional information to help verify the number of retail locations that were required to begin collecting the new assessment on January 1, 2013, and the amount of revenue they are actually collecting. And, Board staff stated that staff is still comfortable with an estimate that the Lumber Products Assessment will generate between \$30 and \$35 million in revenue in 2013, which is consistent with the revenue estimate from Board staff's September 11, 2012, Legislative Enrolled Bill Analysis of AB 1492, referred to in the initial statement of reasons.

However, during the public hearing, Board staff also indicated that staff does not have sufficient information, at this time, to provide a more definitive estimate regarding the number of retail locations for which reimbursement may be claimed under proposed Regulations 2000 and 2001. And, the lack of information is mainly due to the fact that the returns filed for the first and second quarters of 2013 only indicate the number of retail locations that were registered to collect the Lumber Products Assessment on January 1, 2013, and have already reported making

sales of products subject to the Lumber Products Assessment from January 1, 2013, to June 30, 2013. But, the returns filed so far do not indicate whether any additional retail locations that were registered to collect the Lumber Products Assessment on January 1, 2013, will make sales of products subject to the assessment from July 1, 2013, to December 31, 2013, or subsequently report sales that they made during the first two quarters of 2013, but did not timely report. And, Board staff also indicated that staff does not anticipate having sufficient information to provide a more definitive estimate until March or April of 2014 when:

- Staff has been able to review all of the returns filed for 2013;
- Determine which registered retail locations actually reported collecting assessments from purchasers of lumber products and engineered wood products during 2013; and
- Determine which registered retail locations, which Board staff originally determined where likely to sell products subject to the Lumber Products Assessment, did not in fact report collecting any assessments because they did not actually sell products subject to the assessment in 2013.

The Board considered all of the oral and written public comments and the comments made by Board staff during the public hearing. The Board affirmed its earlier determination from the June 11, 2013, BTC meeting, which is referred to in the initial statement of reasons, that the purpose of AB 1492 is to ensure continued sustainable funding for California's forest program to protect the state's forest resources. The Board also determined that the Legislature intended for affected lumber retailers to be fairly reimbursed for start-up costs to implement the Lumber Products Assessment. And, the Legislature intended for the Board to consider how the amount of reimbursement established by the Board would affect the revenue available for California's forest program, not focus solely on retailers' costs, in determining what a fair amount of reimbursement is under PRC section 4629.5, subdivision (a)(3).

Furthermore, the Board recognized that there are a number of variables that need to be taken into account in arriving at a fair amount of reimbursement for start-up costs, such as the amount of funding needed for California's forest program, the amount of revenue that will actually be generated by the Lumber Product Assessment in 2013, the number of retail locations that will actually be eligible to retain reimbursement from the assessments they collect, and the timing of their reimbursement. The Board also realized that it would not have sufficient information to take all of the variables into account and determine whether the total amount of reimbursement prescribed by proposed Regulations 2000 and 2001, \$735 per retail location, can be increased without affecting the revenue available for California's forest program, before emergency Regulation 2000 expires. And, the Board realized that it might not even have sufficient information to make that determination, propose substantially related changes to Regulation 2000 or 2001 or both, if necessary, and then adopt the regulations before the current rulemaking action expires under Government Code section 11346.4.

As a result, the Board concluded that it was still comfortable that the Lumber Products Assessment would generate enough revenue to allow affected retailers to retain \$735 of reimbursement per retail location, for start-up costs, without affecting the revenue available for California's forest program. However, due to the uncertainty regarding all of the variables discussed above, the Board concluded that it could not agree, at this time, that the proposed

regulations could be changed to provide affected retailers with \$5,500 of reimbursement per retail location, for start-up costs, without affecting the revenue available for California's forest program. And, based upon the discussion of the express language of PRC section 4629.5, subdivision (a)(3) in Formal Issue Paper 13-005 and the initial statement of reasons, the Board concluded that PRC section 4629.5, subdivision (a)(3), authorizes the Board to determine the amount that affected retailers may retain as reimbursed for start-up costs to implement the Lumber Products Assessment on January 1, 2013, not the ongoing costs of collection. Therefore, the Board did not agree to make changes to Regulations 2000 and 2001 to increase the total amount of reimbursement provided per retail location or to allow affected retailers to retain additional amounts as reimbursement for ongoing costs.

Instead, based upon the current circumstances, the Board concluded that the best thing the Board could do for affected retailers, at this time, was to:

- Adopt proposed Regulation 2000 through the regular rulemaking process to avoid potential confusion that might be created if emergency Regulation 2000 expired before the proposed regulation was adopted;
- Also adopt proposed Regulation 2001 to provide certainty to affected retailers that they can retain up to \$735 of total reimbursement per retail location for start-up costs while the Board tries to obtain sufficient information to determine whether that amount can be increased without affecting the revenue available for California's forest program; and
- Continue to monitor the implementation of the Lumber Products Assessment and seek additional input from the Legislature to determine whether that amount can be increased, sometime in the future, without affecting the revenue available for California's forest program.

Therefore, during the public hearing, the Board directed staff to report to the Board in April 2014 regarding the amount of Lumber Products Assessments reported during 2013 and the number of registered retail locations that were actually collecting the Lumber Products Assessment in 2013. The Board indicated that it would subsequently ask the Board's Legislative Director about the process for getting additional input from the Legislature, on behalf of the affected retailers. And, at the conclusion of the public hearing, the Board voted to adopt proposed Regulations 2000 and 2001 without making any changes.

In the initial statement of reasons, the Board stated that it anticipated that the adoption of proposed Regulations 2000 and 2001 will provide the following benefits:

1. Provide certainty as to the amount of reimbursement retailers may retain pursuant to PRC section 4629.5;
2. Permit retailers to retain the amount of reimbursement determined by the Board without requiring retailers to keep additional records or substantiate their individual costs; and
3. Preserve the public peace, health, safety, and general welfare, as provided in PRC section 4629.5, subdivision (a)(3).

However, based upon the above discussion, the first anticipated benefit has changed slightly. The Board now anticipates that the adoption of proposed Regulations 2000 and 2001 will

provide certainty as to the amount of reimbursement retailers may retain pursuant to PRC section 4629.5 while the Board tries to obtain sufficient information to determine whether that amount can be increased without affecting the revenue available for California's forest program.

E. Unchanged Information

As explained above, the factual basis, specific purpose, and necessity for, and the problem to be addressed by the proposed adoption of Regulations 2000 and 2001 are the same as provided in the initial statement of reasons. The Board did not make any changes to the text of proposed Regulations 2000 and 2001 prior to adoption.

The adoption of proposed Regulations 2000 and 2001 was not mandated by federal law or regulations and there is no federal regulation that is identical to Regulation 2000 or Regulation 2001.

The Board did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting Regulations 2000 and 2001 that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

In addition, the factual basis has not changed for the Board's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business and the Board's economic impact analysis, which determined that the Board's proposed regulatory action:

- Will neither create nor eliminate jobs in the State of California;
- Nor result in the elimination of existing businesses;
- Nor create or expand business in the State of California; and
- Will not affect the health and welfare of California residents, worker safety, or the state's environment.

The proposed regulation may affect small business.

II. Responses to Public Comments and Determinations Regarding Alternatives

A. Response to Request to Increase the Amount of Reimbursement

The Board received Mr. Dunham's September 10, 2013, letter, discussed above, which requested that the Board adopt a regulation allowing affected retailers to retain \$5,500 per retail location as reimbursement for their costs to collect the Lumber Products Assessment, as an alternative to adopting proposed Regulations 2000 and 2001, which collectively allow affected retailers to retain \$735 of total reimbursement per retail location for start-up costs to collect the assessment. The Board received the letters from Mr. Templeton, Mr. Tuchman, Mr. Higman, and Mr. Thom, and the email from Mr. Peterson, discussed above, which all supported the request that the Board adopt a regulation allowing affected retailers to retain \$5,500 per retail location as reimbursement for their costs to collect the Lumber Products Assessment. The Board also heard

the comments from Mr. Dunham, Mr. Pardini, and Mr. Venezi during the public hearing on September 10, 2013, which supported increasing the amount of reimbursement that may be retained by affected retailers, as discussed above.

As explained above, the Board did not make any changes to proposed Regulations 2000 and 2001 in response to these comments. The Board determined that:

- The purpose of AB 1492 was to ensure continued sustainable funding for California's forest program to protect the state's forest resources;
- The Legislature intended for the Board to consider how the amount of reimbursement established by the Board would affect the revenue available for California's forest program, not focus solely on retailers' costs, in determining what a fair amount of reimbursement is under PRC section 4629.5, subdivision (a)(3);
- There are a number of variables, which are discussed in more detail above, that need to be taken into account in arriving at a fair amount of reimbursement; and
- Due to the uncertainty regarding all of the variables, discussed above, the Board could not agree that the total amount of reimbursement per retail location provided to affected retailers in the proposed regulations could be increased without affecting the revenue available for California's forest program and impairing the effectiveness of AB 1492.

However, the Board has not totally rejected the alternative recommended by Mr. Dunham that the Board adopt a regulation allowing affected retailers to retain \$5,500 per retail location as reimbursement for their costs to collect the Lumber Products Assessment. The Board has indicated that it will seek further input from the Legislature and continue to monitor the implementation of the Lumber Products Assessment to see if the Board can obtain information to indicate that the amount of reimbursement provided to affected retailers for start-up costs, under Regulations 2000 and 2001, can be increased in the future without affecting the revenue available for California's forest program and impairing the effectiveness of AB 1492.

B. Response to Request for Reimbursement for Ongoing Costs

Mr. Peterson's September 6, 2013, email, discussed above, requested that the Board adopt a regulation that provides some continuing reimbursement to affect retailers for future compliance costs. Also, Mr. Higman's September 9, 2013, letter, discussed above, specifically requested that the Board adopt a regulation providing affected retailers with ongoing annual reimbursement of up to \$1,500 per retail location.

As explained above, the Board did not make any changes to proposed Regulations 2000 and 2001 in response to these comments. The Board concluded that PRC section 4629.5, subdivision (a)(3), authorizes the Board to determine the amount that affected retailers may retain as reimbursed for start-up costs to implement the Lumber Products Assessment on January 1, 2013, not the ongoing costs of collection because:

- PRC section 4629.5 expressly provides that retailers may only retain "an amount" determined by the Board and does not authorize retailers to calculate and retain other amounts;

- The express language in PRC section 4629.5, subdivision (a)(3), provides that retailers may only retain the Board-prescribed amount of reimbursement one time, on the retailers' first returns or next consecutive returns filed immediately after the retailers are required to begin collecting the Lumber Products Assessment on January 1, 2013;
- PRC section 4629.5 does not expressly provide for the ongoing retention of a percentage of collected assessments, as do the California Tire Fee Law and Covered Electronic Waste Recycling Fee Law, which both expressly authorize retail sellers to retain 1.5 percent (PRC § 42885) and 3 percent (PRC § 42464), respectively, of the fees they collect as ongoing reimbursement of collection costs; and
- Both the relevant Senate and Assembly floor analyses of AB 1492 refer to retailers being reimbursed for costs to set up collection systems, not retailers being reimbursed for ongoing compliance costs.

C. General Determinations Regarding Alternatives

By its motion, the Board determined that, at this time, no alternative to proposed Regulations 2000 and 2001 would be more effective in carrying out the purposes for which the regulations are proposed, would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The Board could not determine that the alternative allowing affected retailers to retain \$5,500 per retail location for start-up costs would be as effective or more effective than the proposed regulations in achieving the purpose of AB 1492, which was to ensure continued sustainable funding for California's forest program to protect the state's forest resources. And, the Board was and is still concerned that the alternative allowing affected retailers to retain \$5,500 per retail location would actually have a negative effect on the revenue available for California's forest program and, as a result, the alternative would be much less effective than the proposed regulations in accomplishing the purpose of AB 1492.

The Board also determined that the alternative allowing affected retailers to retain future amounts as reimbursement for ongoing compliance costs is inconsistent with the express language of PRC section 4629.5, subdivision (a)(3), the statute being implemented, interpreted, and made specific by the proposed regulations. And, the Board determined that the alternative allowing affected retailers to retain future amounts as reimbursement for ongoing compliance costs is inconsistent with the relevant legislative history regarding the enactment of PRC section 4629.5, subdivision (a)(3), as discussed above. Therefore, the Board determined that the alternative cannot be as effective as the proposed regulations in accomplishing the purpose of implementing, interpreting and making specific PRC section 4629.5, subdivision (a)(3).

D. Reasons for Rejecting Alternatives that Might Lessen Whatever Adverse Economic Impact the Proposed Regulatory Action May Have on Small Businesses

The alternative allowing affected retailers to retain \$5,500 per retail location for start-up costs could potentially lessen whatever adverse economic impact the proposed regulatory action may have on small business by providing those small businesses that are also affected retailers with additional reimbursement for their start-up costs. However, the Board rejected that alternative, at this time, because the purpose of AB 1492 is to ensure continued sustainable funding for California's forest program to protect the state's forest resources, the Board is concerned that the alternative allowing affected retailers to retain \$5,500 per retail location for start-up costs would actually have a negative effect on the revenue available for California's forest program, and, as a result, the alternative would be much less effective than the proposed regulations in accomplishing the purpose of AB 1492 (as discussed in more detail above).

The alternative allowing affected retailers to retain future amounts as reimbursement for ongoing compliance costs could potentially lessen whatever adverse economic impact the proposed regulatory action may have on small business by providing those small businesses that are also affected retailers with additional reimbursement for their ongoing costs associated with collecting the Lumber Products Assessment. However, the Board rejected that alternative because allowing affected retailers to retain future amounts as reimbursement for ongoing compliance costs is inconsistent with the express language of PRC section 4629.5, subdivision (a)(3), and the relevant legislative history regarding the enactment of PRC section 4629.5, subdivision (a)(3), (as discussed in more detail above).

As previously explained, the Board now anticipates that the adoption of proposed Regulations 2000 and 2001 will provide the following benefits:

- Provide certainty as to the amount of reimbursement retailers may retain pursuant to PRC section 4629.5 while the Board tries to obtain sufficient information to determine whether that amount can be increased without affecting the revenue available for California's forest program;
- Permit retailers to retain the amount of reimbursement determined by the Board without requiring retailers to keep additional records or substantiate their individual costs; and
- Preserve the public peace, health, safety, and general welfare, as provided in PRC section 4629.5, subdivision (a)(3).

III. No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of proposed Regulations 2000 and 2001 does not impose a mandate on local agencies or school districts.